

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

No. 26

ALLEN POPE, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

On Writ of Certiorari to the Court of Claims.

SUPPLEMENTAL BRIEF FOR PETITIONER.

(Filed by Petitioner with Consent of Counsel)

ALLEN POPE,
pro se.

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II. *Constitutionality of the Special Act (56 Stat. 1122, ch. 122).*

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QUESTIONS PRESENTED.

I. Whether the present action, authorized by the Special Act of February 27, 1942 (56 Stat. 1122), is of a nature to admit of review by this Court under Article III of the Constitution. On granting petition for certiorari this Court requested counsel to discuss the foregoing question in their briefs and on oral argument.

II. Whether the Special Act of February 27, 1942, 56 Stat. 1122, ch. 122, is constitutional. Question raised by the decision below, and subject of the petition.

JURISDICTION.

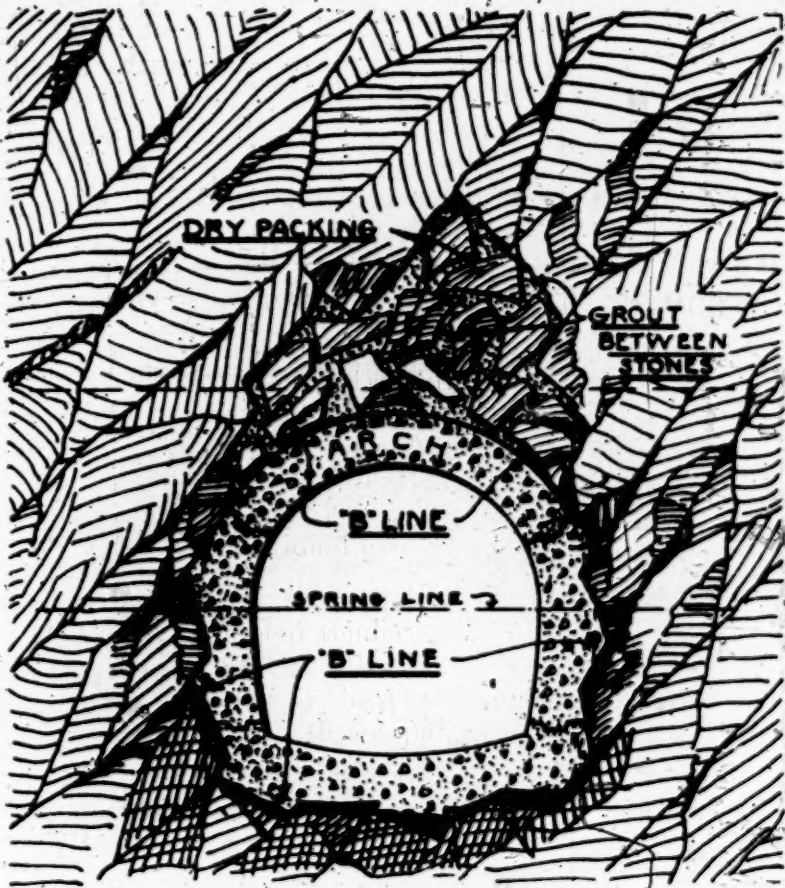
In addition to the Act of February 13, 1925, sec. 3(b) as amended, the jurisdiction of this Court rests upon the Special Act of February 27, 1942, sec. 4; the import of the Act of August 24, 1937 (50 Stat. 751, ch. 754), secs. 2 and 5, which provides for direct appeal and precedence of hearing in this Court when a decision in a case in the Court of Claims is against the constitutionality of an Act of Congress, bears on the question of reviewability of the present action.

PURPOSE OF SUPPLEMENTAL BRIEF.

It has been necessary for both of petitioner's counsel to be out of town, one in the mid-west the other on the west coast, as counsel's brief becomes ready for the printer. Being familiar with petitioner's knowledge of the case, and apprised of his ideas generally by telephone, counsel have consented that petitioner present a brief in supplement to their brief.

In respect of the question of reviewability, petitioner proceeds on the theory that Article III designates the features of all cases reviewable, that the present action possesses such features and therefore is reviewable. With this method of reasoning unless everything is proved, nothing is proved. Hence the apparent length of argument on this subject. The structure of the argument is simple, however, as may be observed from the Subject Index as well as from the Summary of Argument.

As to the question of constitutionality, the jugular of the case seems to lie in the meaning of section 2, particularly in the restrictive phrases which will be shown to be merely delimitations of magnitude of the amounts of the various items of claim and in no way invasion of the judicial prerogative. Petitioner's argument is therefore devoted to such aspects.



CONSTRUCTION IN UNTIMBERED SECTIONS

THE ROOF, ROTTEN SEAMY ROCK, CAVED IN FOR ENTIRE LENGTH OF 2000 FEET. THE CONCRETE ARCH LINING WAS BUILT TO THE "B" LINE. THE SPACE OVER THE ARCH OUTSIDE OF THE "B" LINE WAS REQUIRED TO BE FILLED WITH DRY PACKING, AND, BY DIRECTION OF THE CHIEF OF ENGINEERS ON PLAINTIFF'S APPEAL, WAS REQUIRED TO BE GROUTED FULL. NO PAYMENT HAS BEEN MADE FOR ANY OF THE DRY PACKING NOR GROUT THUS REQUIRED TO BE USED.

ADDITIONAL STATEMENT OF THE CASE.

The following supplemental facts, completely documented to the record, are given for the purpose of clarifying the meaning of section 2, which meaning petitioner considers the "jugular" of the case.

Petitioner, under contract with the United States (R. 9-47), constructed a tunnel for the water supply system in the District of Columbia (R. 24). The work was planned to be carried on mostly through solid rock with provisions made for construction through unstable formations should such be encountered (R. 38, 39). The work was agreed to be paid for on the basis of unit prices (R. 9, 10, 24); with unit prices for excavation (R. 28); for timber bracing for use in loose ground (R. 38, 39); for concrete; for drypacking, i.e., stones packed in place over the tunnel arch where cave-ins might occur (R. 43); and for grout, i.e., liquid cement mortar pumped into place between stones of the drypacking (R. 43). These were five principal items of work to be done, and are now involved in the present action on the basis of the new liabilities created in the Special Act. No solid rock was encountered. The roof of the excavation caved in from one end of the tunnel to the other (*Allen Pope v. United States*, 76 C. Cls. 64, 67, 68, Plates II and III).

Plate II of said prior decision is part of the lower court's Finding III p. 65. It clearly depicts the principal facts of the situation as found by the court and explains terms now used in Section 2 of the Special Act. Plate III *supra* p. 68 is further explanatory of construction in timbered sections but is not here reproduced.

These cave-ins involved unexpected increases in amounts of work over the Government's estimate, which work, however, was required to be done on the Government's obligation regardless of its estimate (R. 24). Upon completion of the work, the then contracting officer declined to pay on the agreed basis. This led to suit in the Court of Claims, No. K-366; decided March 7, 1932; reported in 76 C. Cls.

64; whereby award of \$45,174.46 was made covering portions of the claims, but including nothing as to the items there claimed on the then existing rights of action but now forming the substance of the present action based upon the new liabilities created.

This prior decision, *Allen Pope v. United States*, 76 C. Cls. 64, was pleaded as part of the petition in the present action (R. 2; III). It was requested to be made a part of the record sent up to this Court. The lower court sent up the original contract instead. The latter was only a part of Finding II of the prior decision by reference. The claims pleaded in the present action (R. 4, 6, 7, 8) are founded on the basis of the quantities given in Findings III, IV, V, VI, IX, X and XI. The liquid method of measurement described by the court is set out *supra* 85.

There has been appended to the official printed report of the instant case, *Allen Pope v. United States*, 100 C. Cls. 375, 390-393, a report of the "History Of The Issue." The pages 391-393 are statements of facts in the present action. The lower court, however, did not make them as findings and did not send them up as part of the record (R. 1-16). In large part they are the references just made above to the prior case, and are the parts of that case pertinent to the instant case. This history pages 391-393 indicates that a commissioner's report was made and submitted. The record in the instant case is silent on this feature. Compare verbatim this recited history with the commissioner's report printed in the Appendix hereto.

SPECIFICATIONS OF ERRORS.

The Court of Claims erred:

1. In holding that the Special Act was an unauthorized legislative direction as to the basis for deciding the claim involved.
2. In holding in effect that the Special Act was unconstitutional and void, as an unauthorized direction by the Congress of a judicial function.
3. In failing to render a judgment on the claims.

SUMMARY OF THIS ARGUMENT.

There are now two questions:

I. *Reviewability*, under Article III of the Constitution, of the present action, authorized by the Special Act (56 Stat. 1122; ch. 122).

II. *Constitutionality* of the Special Act.

The first question is that requested to be discussed by this Court upon granting petition for certiorari. The second is that raised by the decision of the lower court, and is the subject of the petition. Both are constitutional questions.

I. As to the Reviewability of the Present Action, Authorized by the Special Act, Under Article III of the Constitution.

Article III establishes the conditions and defines the types of cases reviewable. The first prescription is that the action be a "case" in the sense of Article III, and the other is that review shall be within the currently applicable exceptions and regulations made by Congress. The appellate power extends to all cases arising under the Constitution, the laws of the United States, and to controversies to which the United States is a party. This Court has defined these provisions in numerous decisions. Whence it is to be shown that the present action is such a case, and, thereupon, to set out the applicable exceptions and regulations of Congress.

The present action is a "case" in the sense of Article III in that, as between adverse parties, it was properly brought to issue in the lower court, and there judicially decided against the constitutionality of the Special Act, which judgment was confirmed by order of dismissal, a final judgment, concluding the rights of the parties. The present action is a case authorized by Special Act believed constitutionally conferring jurisdiction upon a legislative court

and constitutionally requiring a judicial determination of the claims mentioned, not ministerial trivia as the lower court complained. Though the lower court declined to make the judicial determination on the claims required by the Act, its judgment that the Act was unconstitutional was a judicial determination, and, as confirmed by its order of dismissal on such account, is believed to satisfy this requirement for a "case" under Article III.

The cause depends upon the validity of a law of the United States upon which petitioner has asserted his rights. It is, therefore, a case arising under the Constitution. Its correct decision depends upon the construction of both the Constitution and the Special Law of the United States. Therefore, it arises under the Constitution and law of the United States.

The United States may not be sued without its consent. It has given consent by the Special Act. Suit was filed. The United States, in addition to other acts of defense, filed general traverse denying each and every allegation. The United States thus became party defendant. Whence, the present action is a "controversy to which the United States is a party."

The currently effective exceptions and regulations of Congress are (1) the Act of February 13, 1925, as amended, sec. 3(b), which authorizes review from the Court of Claims on certiorari; (2) the Special Act, which, in sec. 4, provides for application for certiorari as in other cases; and (3) the Act of August 24, 1937, 50 Stat. 751, ch. 754, secs. 2 and 5, which provides for direct appeal and for precedence of hearing in this Court when any decision in the Court of Claims is against the constitutionality of any law of Congress. While the rights of the parties are no doubt forfeit thereunder because of the thirty day clause, the spirit of the Act adberes, if not to the right of review, at least to the importance of review. 6

II. As to the Constitutionality of the Special Act.

The substance of the argument offered under this question is a showing of the meaning of the Act; that the provisions thereof, in accordance with such meanings, are within the constitutional powers of Congress to enact; that they are proper legislative directions to the Court of Claims; and do not in any respect invade the rights of the judicial branch of the government; that the only restrictions of any kind pertain solely to magnitude; i.e., as to the number of items of claim that may be sued for, and the quantities of work in such items; that nothing prevents the court from finding according to its own methods whether the work was done, whether it was paid for, and whether the government received the use and benefit; that the Act provides a new cause of action; that the action based thereon is a new case; that the Act may be fairly so interpreted, thus avoiding need for a ruling on its constitutionality otherwise; that thereupon the decision below should be reversed with instructions to proceed in accordance with the provisions of the Act.

ARGUMENT.

- I. "Whether the Present Action, Authorized by the Special Act of February 27, 1942 (56 Stat. 1122), is of a Nature to Admit of Review by This Court Under Article III of the Constitution."

When granting petition for certiorari this Court requested counsel to discuss the above question in their briefs and on oral argument. Expressed in other words, the words of Article III, the question appears to be ~~whether~~ (and answer is to be shown that):

The present action (1) is a "case" in the sense of Article III; (2) is a case "in law," (3) "arising under this Constitution, the laws of the United States," (4) is a "controversy to which the United States shall be (is) a party," (5) is not such other type case named as to which "the Su-

preme Court shall have original jurisdiction"; nor (6) any other type named in Article III as to which the Court has appellate jurisdiction; and, consequently, is such a case as to which "the Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make."

Counsel has discussed principally one aspect of the conditions required for a "case" in the sense of Article III, i.e., that a judicial determination was required to be made by the lower court under the authority of the Special Act, not a mere ministerial operation, and that therefore a decision based thereon is reviewable. It seems to petitioner that other conditions are exacted by Article III in order to reach the appellate power of this Court; and that, on the other hand, very important rights are granted by Article III which open the door to review. Petitioner discusses such features as follows:

These provisions of Article III are first defined on authority of this Court's decisions. Thereafter in each instance there are set out the corresponding features in the present action which show conformance to such requirements.

(1) *"In all cases"*: As to the natures of all "cases" subject to the appellate power of the United States as vested in the Supreme Court, this Court has determined that there must be three essentials to such cases: (a) the action must be in certain prescribed form, (b) between adverse parties, and (c) must be a judicial determination, the final and indisputable basis of action by the parties. The first two are almost obvious. The latter requires some discussion. Discussion of each is here set out so that all may be quickly glanced.

(a) *Prescribed form; the principle defined*: The judicial "power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case . . ." This principle is supported by the following citations in "Con-

stitution of the United States of America (Annotated)" Senate Document No. 232, 74th Congress, 2nd Session, p. 450. *Osborn v. Bank of United States*, 9 Wheat. 738, 819; *Smith v. Adams*, 130 U. S. 167, 173; *Muskrat v. United States*, 219 U. S. 346, 356-358; *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 456.

(a) *Prescribed form; in the present action:* Petitioner has submitted his claims to the judicial power capable of acting upon them, the Court of Claims, which is the power named in the Special Act, and the only power thereunder which may have original jurisdiction. Petitioner has asserted his rights in the form prescribed by law. These conditions are met by the pleadings (R. 1-9). According to this Court's definition, petitioner's claims have become a "case" in these requisites:

(b) *Adverse litigants; the principle defined:* The litigants in a case subject to the judicial power must be truly adverse parties, *Muskrat v. United States*, 219 U. S. 346, 359-361; especially is this true when the court assumes the grave responsibility of passing upon the constitutional validity of legislative action, *United States v. Johnson*, 319 U. S. 302, 304, 305.

(b) *Adverse litigants; in the present action:* The parties are adverse. For seventeen years petitioner has sought in strenuously contested efforts to obtain payment for this work: first, with successive authorities in the War Department; then with the Comptroller General; then lengthy litigation in the Court of Claims involving five motions for new trial; then much opposed effort to obtain legislation in Congress culminating, however, in the present Special Act, restricted to four particular items of the fifteen originally claimed, and now provided to be adjudicated on the basis of the therein newly created liabilities, i.e., that the work had been done, that it had not been paid for, and that the Government had received the use and benefit. These rights of action, created by the Special Act,

petitioner asserted in his pleadings below (R. 1-9). These pleadings respondent has denied by its general traverse (R. 47). Whence, that the parties are adverse may hardly be gainsaid. For this history of the issue, see counsel's brief, "Statement", and (R. 47, 48), also *Allen Pope v. United States*, 76 C. Cls. 64; and 100 C. Cls., 375, 390.

(c) *Judicial determination; the principle defined:* The judicial power exercised in a case must not be moot nor merely ministerial, ancillary or advisory, but a judicial determination, the final and indisputable basis of action by the parties, enforceable by an order of execution issuing from the court.

Since the lower court complains (R. 49, 50, bottom each page) that the Special Act gives it but minor duties to perform, and questions their judicial nature, and declined to perform them; but did, nevertheless, exercise judicial determination in its primary essence by adjudging the Special Act unconstitutional, and enforced such judicial determination by an order of dismissal, it appears well to quote pertinent decisions of this Court in some detail.

What the lower court judicially decided and what it ordered are the final factors that make the present action reviewable.

This Court's decisions on the point follow:

United States v. Ferreira, 13 How. 40.

Mr. Chief Justice Taney: (1851)

p. 47. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons

to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner. The act of 1834 calls it an award, and an appeal to this court from such a decision, by such an authority from the judgment of a court of record, would be an anomaly in the history of jurisprudence. An appeal might as well have been taken from the awards of the board of commissioners, under the Mexican treaty, which were recently sitting in this city.

Nor can we see any ground for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right therefore to make the approval of the award by the Secretary of the Treasury, one of the conditions upon which they would agree to be liable. No claim, therefore, is due from the United States until it is sanctioned by him; and his decision against the claimant for the whole or a part of a claim as allowed by the judge is final and conclusive. It cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an act of Congress.

* * * * *

p. 48. The powers conferred by these acts of Congress upon the judge as well as the Secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a Secretary as well as a commissioner. But it is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States.

Mr. Justice Harlan: (1899)

See pages 455-457. (the Court referring to *Gordon v. United States*, 2 Wall. 561, printed 117 U. S. 697).

p. 457. "The award of execution," Chief Justice Taney said, "is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term without it. * * *

In a more recent case this court dismissed an appeal from a final order made in the Court of Claims in virtue of a particular statute observing: "Such a finding is not made obligatory on the department to which it is reported—certainly not so in terms, and not so, as we think, by any necessary implication. We regard the function of the Court of Claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made by the statute the final and indisputable basis of action either by the department or by Congress." *In re Sanborn*; 148 U. S. 222, 226; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 483.

"Under the principle established in the cases above cited, the objections urged against the jurisdiction of the Court of Claims and of this court cannot be maintained, if the present proceeding involves a right which in its nature is susceptible of judicial determination, and if the determination of it by the Court of Claims and by this court is not simply ancillary or advisory but is the final and indisputable basis of action by the parties."

Keller v. Potomac Electric Power Co., 261 U. S. 428.

Mr. Chief Justice Taft: (1922)

p. 444. Such legislative or administrative jurisdiction, it is well settled cannot be conferred on this Court either directly or by appeal. The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the Court in *Muskat v. United States*, 219 U. S. 346. The principle there recognized and enforced on reason and authority is that the jurisdiction of this Court and of inferior courts of the United States ordained and established by Con-

gress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this Court without real parties or a real case, or to administrative or legislative issues or controversies. *Hayburn's Case*, 2 Dall. 410, note; *United States v. Ferreira*, 13 How. 40, 52; *Ex parte Siebold*, 100 U. S. 371, 398; *Gordon v. United States*, 117 U. S. 697; *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 215 U. S. 216.

Ex Parte Bakelite Corporation, 279 U. S. 438.

Mr. Justice Van Devanter: (1928)

p. 450. A like view has been taken of the status and jurisdiction of the courts provided by Congress for the District of Columbia. These courts, this Court has held, are created in virtue of the power of Congress "to exercise exclusive legislation" over the district made the seat of the government of the United States, are legislative rather than constitutional courts, and may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of Article III, but are merely in aid of legislative or executive action, and therefore outside the admissible jurisdiction of courts established under that Article. (*Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 442-444; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, 700.)

Williams v. United States, 289 U. S. 553.

Mr. Justice Sutherland: (1932)

p. 564. The decision of the *Gordon* case in the 2nd of Wallace was announced on March 10, 1865. At the next session of Congress § 14 was repealed. Ch. 19, 14 Stat. 9. Since that time it never has been doubted that Congress may authorize an appeal to this court from a final judgment or decree of the Court of Claims. *United States v. Jones*, 119 U. S. 477, 478-479; *In re*

Sanborn, 148 U. S. 222, 225; *Luckenback S. S. Co. v. United States*, 272 U. S. 553, 536 *et seq.*, or that the judgment of this court rendered on such appeal constitutes a final determination of the matter. *United States v. O'Grady*, 22 Wall. 641, 647. It is equally certain that the judgments of the Court of Claims, where no appeal is taken, under existing laws are absolutely final and conclusive of the rights of the parties unless a new trial be granted by that court as provided by law. *Id.* Indeed as appears from the cases already cited and others, such finality and conclusiveness must be assumed as a necessary prerequisite to the exercise of appellate jurisdiction by this court.

Counsel quotes *Aetha Life Insurance Co. v. Haworth*, 300 U. S. 227, to a related purpose see counsel's brief. This case cites many authorities.

In addition to these definitions of judicial determination, it is observed that where there is question of the constitutionality of an Act in a particular case, it is the province and duty of the judicial branch to say what the law is. Is this not in itself the essence of judicial function? See *Coleman v. Virginia*, 6 Wheat. 264, 404, quoted in context post. The following bears on the point:

Marbury v. Madison, 1 Branch 137.

Mr. Chief Justice Marshall:

p. 137. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution disregarding the law; the court must determine which of these conflicting

rules governs the case. This is of the very essence of judicial duty.

(c) *Judicial determination as it appears in the present action:*

The present action, as authorized by the Special Act, is not only one wherein the court of original jurisdiction is authorized by the Act to make a judicial determination, but apparently is required to do so in the sense of Article III. The Act commencing with the first section reads:

"Be it enacted * * * * that jurisdiction be, and the same is hereby, conferred upon the Court of Claims * * * * to hear, determine, and render judgment * * *"

This would seem to mean that the Court of Claims shall take evidence, weigh it, determine the facts therefrom, adjudicate them against the law, and enter an executory order of judgment finally disposing of the issue. All of these operations are judicial functions in the true sense of Article III. A decision made under authority of the Act is not to be moot, ministerial, ancillary, nor advisory. It is not to be submitted as an intermediate step to a final determination by, nor to be for the use of, any department, officer, or committee of Congress. Neither is it a delegation of authority as to a commissioner, appointed under a treaty, vested with authority to make a conclusive award. The jurisdiction conferred by the Act is to a court of law, a court of record, a legislative court of the United States, authorized by other laws to render final and binding decision and so recognized by this Court for years. *Williams v. United States*, 289 U. S. 553, 564, *supra*.

Section 4 of the Act, authorizing application for certiorari, confirms this intent of Congress that a judicial determination in the true sense of Article III be rendered. As counsel has indicated, Congress is presumed to know the law and to know that none other than a true judicial determination could be reviewed. Whence the intent to

procure a real judicial determination in the sense of Article III is clear.

That such a determination is required and authorized by the Special Act unhampered by restrictions either as to so-called ministerial directions or invasion of judicial prerogative is seen from the plain provisions with respect to the item of excavation of caved-in materials, as follows (R. 1):

Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed, for which he has not been paid, but of which the Government has received the use and benefit; namely; * * * for the work of excavating materials which caved in over the tunnel arch. * * *

Sec. 3. * * * and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims together with any additional evidence which may be taken.

If reference is now made to Plate II reproduced hereinbefore, the work involved is the excavation of the material which caved in over the tunnel arch. Nothing is said in these provisions as to how the Court shall measure or compute nor is any limit fixed except that the materials shall have caved in from over the arch. The Court is free by its regular methods to ascertain the three criteria fixed in Section 2 that the work had been done, had not been paid for, and that the Government had received the use and benefit. The Court is entirely free to use all the evidence available. Nothing specifies what effect the evidence shall have. This pertains to the largest item of the claim. It is, therefore, one of the principal "ingredients" of the action based on this law of the United States and the action is therefore reviewable because of this feature alone.

The lower court dismissed this action because of the alleged unconstitutionality of the Act. This in itself was a judicial determination in its primary essence, i.e., in deciding what the law of the case is. Because of this judgment the Court of Claims dismissed the petition and enforced its judgment by executory order. This was final judgment. It concluded the rights of the parties.

(2) *Case in law and equity; the principle defined:* This Court has often ruled that a case at common law is to be understood as one in which legal rights are to be ascertained as contrasted with one where equitable rights alone are recognized and equitable remedies administered. In support of this principle, the following citations are given on p. 452 of "Constitution of the United States of America" *supra*. *Irvine v. Marshall*, 20 How. 558; 565; *Persons v. Bedford*, 3 Pet. 433, 447; *Robinson v. Campbell*, 3 Wheat. 212, 222; *Fenn v. Holme*, 21 How. 481, 484; *Sheirburn v. DeCordova*, 24 How. 423; *Strother v. Lucas*, 6 Pet. 763, 768, 769; *Parish v. Ellis*, 16 Pet. 451, 453, 454. For further definition of principles of equity applied in English Courts, before 1789 and developed in Federal Courts see *Gordon v. Washington*, 295 U. S. 30, 36; *Waterman v. Canal-Louisiana Bank and T. Co.*, 215 U. S. 33, 43. This subject of "cases in law and equity" is also discussed in the next succeeding section (3) covering "cases arising under the constitution," etc., note especially *Cohens v. Virginia*, 6 Wheat. 264, 405 as quoted post p. 19.

(2) *A Case in law; in the present action:* The present action is a case where legal rights as the cause of action and jurisdiction are to be ascertained under terms of a Special Law and under other applicable laws. The Act does not specify any equitable rights for adjudication. The point here made under the heading of this paragraph is that the present action is a case "in law" within the meaning of Article III.

(3) *Cases arising under this Constitution and the laws of the United States; the principle defined:* Definition of

what these constitutional terms mean is best observed from this Court's decisions as follows :

Cohens v. Virginia, 6 Wheat: 264.

Mr. Chief Justice Marshall: (1821)

p. 378. The second section of the third article of the Constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the Courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the Court to all the cases described, without making in its terms any exceptions whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

p. 379. If it be to maintain that a case arising under the Constitution, or a law, must be one in which a party comes into Court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may be truly said to arise under the constitution or a law of the United States, wherever its correct decision depends on the construction of either. Congress seems to have given its own construction of this part of the constitution in the 25th section of the judiciary act; and we perceive no reason to depart from that construction.

p. 392. And we think that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties.

The constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it

appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected.

p. 404. It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this on the present occasion, we find this tribunal invested with appellate jurisdiction in *all* cases arising under the constitution and laws of the United States. We find no exception to this grant and we cannot insert one.

p. 405. The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right, under such law, is asserted in a Court of justice. If the question cannot be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a Court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend. * * *

p. 416. We are not restrained, then, by the political relations between the general and State governments, from construing the words of the constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

They give to the Supreme Court appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever Court they may be decided. In expounding them, we may be permitted to take into view those considerations to which Courts have always allowed great weight in the exposition of laws.

Tennessee v. Davis, 100 U. S. 257.

Mr. Justice Strong: (1879)

p. 264. And a case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton. (*Cohens v. Virginia*, 6 Wheat. 264) It is not merely where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party, as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim of protection, or defence of the party, in whole or in part by whom they are asserted. Story on the Constitution, sect. 1647; 6 Wheat. 379: It was said in *Osborne v. The Bank of the United States* (9 Wheat. 738). "When a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause although other questions of fact or of law may be involved in it." And a case arises under the laws of the United States when it arises out of the implication of the law.

Western Union Telegraph Co. v. Ann Arbor Railroad Co., 178 U. S. 239. Mr. Chief Justice Fuller: (1899)

p. 243. "When a suit does not really and substantially involve a dispute or controversy as to the effect or con-

struction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal or logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground. *Gold Washing and Water Co. v. Keyes*, 96 U. S. 199; *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571."

The above cited with approbation in *Gableman v. Peoria Etc. Ry. Co.*, 179 U. S. 335, 339.

(3) *A case arising under this Constitution, the laws of the United States as shown in the present action:*

The correct decision of this case depends upon the construction of both the Constitution and a law of Congress, the Special Act (See *Cohens v. Virginia*, *supra*). It grew out of legislation of Congress (See *Tennessee v. Davis*, *supra*).

The court below plainly says (R. 49, 50):

"The history recited above presents a problem as to the power of Congress, under the Constitution, to do what the special act attempts to do." * * *

"Thus a second serious question as to the Constitutional power of Congress is presented.

"The government urges that we avoid the constitutional issue by construing the act to mean only that a new trial is granted to the plaintiff by the act, in which new trial the court will be free to decide, in the usual manner of a court, the questions of law and fact involved in the case." * * *

"While we recognize that a court should make every proper effort to give a statute a construction which keeps it clear of serious constitutional questions, we are unable to so construe the special act. * * * We therefore undertake the question as to whether Congress

can effectively direct this court to again decide this case, which it has once finally decided under its general jurisdiction, and to decide for the plaintiff, and give him a judgment for an amount which simple computation based upon data referred to in the special act, will produce."

The point of argument discussed under this heading is as to whether the correct decision of the case turns on the construction of either the Constitution or a law of Congress. From the foregoing quotations of the decision below and its conclusion, i.e.,

"It follows from what we have said that the plaintiff's petition must be dismissed. It is so ordered." (R. 59.)

it is clear that the correct decision depends upon the construction of both the Constitution and a law of Congress.

(4) *Controversies to which the United States shall be a party; the principle defined:* This means either party plaintiff or party defendant. Since the United States in the present action is party defendant, it is only necessary to discuss such aspect. "No principle is better established than that the United States may not be sued in the courts of this country without its consent." *State of Louisiana v. McAdoo*, 234 U. S. 627, 628, and cases there cited; *United States v. Clarke*, 8 Peters 436; *United States v. Lee*, 106 U. S. 196; *Kansas v. United States*, 204 U. S. 331, 333.

(4) *The present action is a controversy to which the United States is a party:* The United States has given its consent to be sued by virtue of the Special Act of Congress signed by the President (R. 1). Therefore, the United States may be sued in accordance with the consent thus granted. In accordance with such consent, the petitioner sued the United States in the Court of Claims filing his petition July 7, 1942 (R. 1). On August 15, 1942, the United States filed its General Traverse denying each and every allegation made by petitioner (R. 47). Whereupon, or on

December 8, 1943, the case, on the basis of a commissioner's report (*Allen Pope v. United States*, 100 C. Cls. 375, 391) printed briefs and oral argument by the parties, Mr. Assistant Attorney General Francis M. Shea for the defendant, the case was submitted on merits (R. 47). Thus the United States has become properly, and is, party defendant to the controversy.

(5) *In other classes of cases or controversies named; the principle defined:* This clause covers other remaining classes of cases named in Article III. They are those arising from treaties; all cases of admiralty and maritime jurisdiction; controversies between citizens of different States; between citizens of the same State claiming lands under grants of different States; between the citizens of a State and foreign States, citizens or subjects.

(5) *The present action is not of any of such other classes of cases named in Article III as are subject to the appellate jurisdiction of this Court:* This is sufficiently answered above, where it is shown from inspection of Article III that the present action is not such another case.

(6) *And in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction; the principle:* Further definitions need not be sought.

(6) *Nor is the present action a case affecting ambassadors, other public ministers and consuls, nor one in which a State is a party as to which the Supreme Court shall have original jurisdiction:* The present action is a claim solely against the United States. Answer is patent from the very words of Article III and of the Special Act.

Proofs of reviewability summarized: Compressed into a single paragraph, the substance of the proofs of the conformance of the present action to the requirements of Article III for a reviewable case and believed shown are thus: The present action, by its pleadings, presented to the proper judicial authority, the Court of Claims, a court of

record and a court of the United States, for adjudication, complies with prescribed legal form. The parties litigant are adverse in their interests in the cause. The case was heard in the Court of Claims in the usual manner on the basis of evidence offered by the parties, report of findings of fact by a commissioner, briefs and argument by counsel. The court, pursuant to customary practice of the judicial function in every court of law, considered first the law in the case, the jurisdictional Special Act. It decided the Act to be unconstitutional. This was exercise of judicial function in its primary essence. Thereupon, or on the basis of such conclusion of law, the Court of Claims, without including any findings of fact (in such respect contrary to this Court's Rule 41, and sec. 3 (b) of the Act of February 13, 1925, amended), dismissed the petition and entered executory order to such effect. This was final judgment. It leaves the parties without recourse. The action, as it stands, further conforms to the provisions for review as prescribed by Article III in that it is a case in law, arising under and requiring construction of the Constitution and laws of the United States for its correct decision; the United States is party defendant; the case is not one as to which the Supreme Court has original jurisdiction.

Conclusion: Under Article III, the Supreme Court has appellate jurisdiction, both as to law and fact, in the present action, authorized by the Special Act of February 27, 1942 (56 Stat. 1122), with such exceptions and under such regulations as the Congress has made.

Exceptions and Regulations of Congress: The final point to be established in order to show the delimitations of power of review of this Court in the present action, is to set out the exceptions and regulations which Congress has made, which are currently effective and applicable in the present action. They are:

- (1) The Special Act, approved February 27, 1942, 56 Stat. 1122, ch. 122; sec. 4 thereof, provides for application for writ of certiorari as provided by law in other cases (R. 2):

Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

Since the petition for certiorari has already been granted by this Court, section 4 has this present significance: It supports argument that the present action was intended by Congress under the Special Act to be the kind of a "case" with respect to subject matter and finality of decision of the Court of Claims as would require a "judicial determination" in the sense of Article III, for Congress knew that no other than such a case would be reviewable.

(2) The Act of February 13, 1925, as amended by the Act of May 22, 1939, Sec. 3 (b), 53 Stat. part 2, 752, ch. 140, the same being the basis of this Court's Rule 41, the Act itself being published in the "Appendix To Rules", pp. 1-10, of the current issue of the "Revised Rules of the Supreme Court of the United States."

This section 3 (b) of this Act stands virtually as the currently effective "exceptions and regulations of Congress" applicable to the present action. It provides for review on certiorari.

However, under the extraordinary circumstances where the Court of Claims might rule against the constitutionality of an Act of Congress, as has been done in the present action, the first time that the Court of Claims has so ruled in its entire history of eighty-nine years, there has been enacted the following statute:

(3) The Act of August 24, 1937, 50 Stat. 751, ch. 754, Sections 2 and 5 thereof, the same being the basis of this Court's Rule 47, the Act itself being published in the "Appendix to Rules", pp. 11-13 of the current issue of the "Revised Rules of the Supreme Court of the United States."

This Act provides for direct appeal and precedence of hearing in this Court in the event of a decision in the Court of Claims against the constitutionality of an Act of Congress. The Court of Claims has taken no notice of the Act in its rules as the Act requires. Neither do the Rules of any other Federal Court notice Section 2 of this Act, except those of this Court, so far as petitioner discovers. Neither party availed itself of the 1937 Act within the prescribed thirty day period.

The important point to notice with respect to this Act is that even though the rights of action of the parties thereunder may be, or are, forfeit, the spirit of the Act remains, illustrating the seriousness attached by Congress and the President to a challenge by the judiciary of the constitutionality of any legislative act.

Conclusion as to Question I, the reviewability, under Article III of the Constitution, of the present action authorized by Congress: The present action, in its legislative authorization, in what has been done thereunder by the parties, and by the court below, the prescribed court of original jurisdiction, the Court of Claims, conforms in all respects to the requirements of Article III of the Constitution for review by this Court. Whence, this Court should review the case on certiorari in accordance with the Act of February 13, 1925, sec. 3(b) as amended, as petitioned, and should consider the matter of constitutionality of the Special Act as questioned by the court below.

II. CONSTITUTIONALITY OF THE SPECIAL ACT.

(56 Stat. 1122, ch. 122)

This supplemental discussion of the question of constitutionality of the Special Act relates to Section 2, to the provisions thereof describing the four items of work permitted to be sued for, and especially to the phrases which are seemingly restrictive upon the court, but which, in net effect, are but limitations of magnitude, and are not impositions upon the judicial function. In order to show how this

is so these provisions are here examined with respect to each of the four items of claim permitted to be considered.

The words of the Act are plain, and, it is believed, may be clearly understood as they stand. It would seem that the obvious purpose of the Act would resolve any doubts; and that no data other than those referred to in the Act, i.e., certain parts of the prior decision (*Allen Pope v. United States*, 76 C. Cls. 64) need be referred to as aids in construction.

The general conditions, i.e., the new criteria established, applying to all four items are to be borne in mind in the consideration of each. It will be observed that the restrictive phrases apply only to the first of such conditions, i.e., to the amounts of work performed.

Item (1). The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely,

for excavation and concrete work *found by the court* to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or pay line three inches, and as to omit the timber lagging from the side walls of the tunnel; * * * (R. 3)

All of this is by way of descriptive nomenclature, but the italicized phrase "*found by the court*" is restrictive. The court previously found these quantities exactly (R. 2, 4); *Allen Pope v. United States*, 76 C. Cls. 64, 75; *Allen Pope v. United States*, 100 C. Cls. 375, 391. The court is now directed to use them as basis for the new determination. The lower court seemingly objects in this instance to accepting as basis for its new judgment quantities which it had previously found, the same being but a minor duty (R. 49, bottom of page). The court overlooks, however, the purpose of Congress. Congress wants it ascertained whether any

of that work had been paid for and whether the Government had received the use and benefit. For such it authorizes judgment be rendered. These are the judicial functions authorized for this item. If any of such work is thus found not to have been paid for and it is also found that the Government has had the use and benefit, then judgment is to be rendered for such. Nothing is prescribed to interfere with the judicial function.

Item (2). The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, * * *

for the work of excavating materials which caved in over the tunnel arch; * * * (R. 3)

This clause is entirely descriptive of what may be claimed for. There is not a word as to what the quantity shall be, except that it be that which caved in from over the tunnel arch. See Plate II opposite page 3 hereof. There is no direction as to any process the court shall use in determining the quantity of this work. Obviously this is left entirely to the court to be determined from the evidence. Nothing prescribes what effect any of the evidence shall have. As to this item the court is to determine all three of the general criteria, how much excavation was thus performed, whether any of it was paid for and whether the Government had the use and benefit.

Item (3). The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, * * *

for filling such caved in spaces with drypacking * * * as directed by the contracting officer, the amount of the drypacking to be determined by the liquid method as

described by the court and based upon the volume of grout actually used; (R. 3, 6)

The last clause as italicized is restrictive upon the quantity to be determined by the court but not upon the court's discretion in determining the quantity from the evidence, nor upon any other feature of judicial function. What the Act imposes is merely the use of what Congress knew from the prior decision to be an available method of measurement, with which it was satisfied, knowing from such prior decision the maximum amount of drypacking that computation by this method would produce. The liquid method described by the court is fully set out in the prior decision, page 85. In substance it is that if any space is filled with a known volume of liquid such known volume is the volume of the space filled. Congress did not specify the result. It merely authorized the Court of Claims in using the liquid method to base its computation upon the "volume" of "grout actually used." These are two unknowns to be ascertained judicially by the court, i.e., the grout which was actually used and, secondly, the volume of such grout. These facts the court is likewise to determine by its usual rules from the evidence in the case. Having thus determined the quantity, the court will then ascertain the two other ultimate facts as to how much of such work remains unpaid for and whether or not the Government received the use and benefit.

Item (4). The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely,

for filling such caved-in spaces with grout, as directed by the contracting officer, *the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the drypacking. (R. 3)*

This final italicized clause is limitation positively fixed. This means, as under Item (1), that such amount is to be the basis of the court's new adjudication by which it shall determine how much of such work has not been paid for whether or not the Government received the benefit.

The foregoing is a plain statement of the meaning of the Act. It is the meaning which petitioner has pleaded (R. 3-8). He believes it fairly within the meaning of the statute, both in its words and in its general tenor. Reference is made to the rules adopted by this Court for its own governance, as stated by Mr. Justice Brandeis in the case of *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 346, 348, note 7:

7. When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. *Crowell v. Benson*, 285 U. S. 22, 62.

As to conformance to constitutional principles and the power of Congress, the following cases apply:

United States v. Butler, 297 U. S. 1.

p. 62. There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that this court assumes a power to overrule or control the action of the peoples' representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty,—to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former. All this court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the

provisions of the Constitution; and having done that its duty ends.

United States v. Realty Co., 163 U. S. 427.

p. 440. Under the provisions of the Constitution (article I, section 8) Congress has power to lay and collect taxes, etc., "to pay the debts" of the United States. Having power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object. What are the debts of the United States within the meaning of this constitutional provision? It is conceded and indeed it cannot be questioned that the debts are not limited to those which are evidenced by some written obligation or to those which are otherwise of a strictly legal character. The term "debts" includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a "debt" to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based on considerations of a moral or merely honorary nature, such as are binding on the conscience or honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded. To no other branch of the government than Congress could any application be successfully made on the part of the owners of such claims or debts for the payment thereof. Their recognition depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body. Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity. A long list of acts directing payments of the above general character is appended to the brief of one of the counsel for the defendants in error. The

acts are referred to not for the purpose of asserting their validity in all cases, but as evidence of what has been the practice of Congress since the adoption of the Constitution. See also among other cases in this court, *Emerson v. Hall*, 13 Pet. 409; *United States v. Price*, 116 U. S. 43; *Williams v. Heard*, 140 U. S. 529.

Ex Parte Bakelite Corp., 279 U. S. 438.

p. 451. Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

p. 452. Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands, or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring suits to be brought in a legislative court specially created to consider them.

The Court of Claims is such a court. It was created and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies.

For sixty-five years following the adoption of the Constitution Congress made it a practice not only to determine various claims itself but also to commit the determination of many to executive departments. In time, as claims multiplied, that practice subjected Congress and those departments to a heavy burden. To

lessen that burden Congress created the Court of Claims and delegated to it the examination and determination of all claims within stated classes. Other claims ~~have since been~~ included in the delegation and some have been excluded. But the court is still what Congress at the outset declared it should be — "a court for the investigation of claims against the United States." The matters made cognizable therein include nothing which inherently or necessarily requires judicial determination. On the contrary, all are matters which are susceptible of legislative or executive determination and can have no other save under and in conformity with permissive legislation by Congress.

Upon the foregoing, supplementing the brief of counsel, it is believed shown that the requirements for constitutionality are met, that the errors of the court below are demonstrated as assigned.

ALLEN POPE,

Pro se.

APPENDIX.

IN THE

Court of Claims of the United States

No. 45704.

(Filed Mar 3 1943)

ALLEN POPE

v.

THE UNITED STATES.

REPORT OF COMMISSIONER.

To the honorable the Chief Justice and Associate Judges
of the Court of Claims of the United States:

Pursuant to the order of reference in the above-entitled case, the undersigned Commissioner makes the following report of his findings of fact:

1. The plaintiff is the identical Allen Pope, plaintiff in cause docketed as No. K-366, decided in this Court March 7, 1932 and reported 76 C. Cls. 64. The special findings of fact made therein by the Court are made a part of these findings by reference.

The plaintiff in case No. K-366 sued on a contract entered into December 2, 1924, for the construction of a tunnel designed to carry water for the District of Columbia. In that suit the plaintiff was given judgment for \$45,174.46. This judgment consisted (1) of an item of \$13,290.22, representing the expense of substitution ordered by the contracting officer in method but not authorized by the contract; (2) of an item of \$2,500 for timber used by the contractor and authorized by the contract; (3) of an item of \$231.54 for concrete actually placed and authorized by the contract to be placed; (4) of an item of \$500 earned, withheld and wrongfully retained for indemnification; (5) of items

aggregating \$17,427.70 for excess work due to defendant's erroneous lines and grades, including 723 cubic yards of material caved-in over the arch in the rock sections of the tunnel, and hereinafter to be referred to; (6) and of an item of \$11,225, damages for delay due to interference.

2. Section V (1) of the petition in the instant case claims (a) \$969, excavation of caved-in material, 57 cubic yards at \$17 between an original contract line, known as the "B" line, and the "B" line as lowered three inches by the contracting officer; (b) \$4,879, for excavation of 287 cubic yards of cave-ins at \$17, due to omission of side-wall lagging; and (c) \$4,879, for filling the 287 cubic yards of caved-in spaces at \$17, a total of \$10,727. This claim of \$10,727 was made in Section XII of plaintiff's petition in case No. K-366. The Court's finding made relative thereto is No. XI. Recovery was denied.

Section V (2) of the petition in the instant case claims \$81,277 for excavation of 4,781 cubic yards of material at \$17, caved-in over the tunnel arch. The petition sets forth the total cubic yardage of such material as 5,561 cubic yards, and excludes therefrom (a) 57 cubic yards claimed as above in Section V (2) of this petition, and (b) 723 cubic yards allowed for by the Court, Finding X in case No. K-366, and mentioned in Finding No. 1 hereinabove. There is no claim in the original petition in case No. K-366 for the excavation as such of this 4,781 cubic yards, but there is therein a claim for grouting and drypacking the space voided by the 5,561 cubic yards of caved-in material. See Sections IV and V of the original petition, case No. K-366. For drypacking in this area and grouting see the Court's findings in case No. K-366, Findings III and IV, on which the Court made no allowance.

Section V (3) of the petition in the instant suit makes claim to \$14,240.70, which plaintiff says remains unpaid for dry-packing the 5,561 cubic yards mentioned above (Section V (2) of the instant petition), being a balance of 4,746.9 cubic yards of drypacking at \$3 per cubic yard, plaintiff having been paid for 814.1 cubic yards only on the contracting officer's estimate. This item is substantially Section V of the original petition. See the Court's findings in case No. K-366, Findings III, IV, and VI. This item was not allowed in the judgment.

Section V (4) of the petition in the instant suit lays claim to \$56,362.10, as 18,790.7 bags of cement at \$3.00 per bag.

The correct extension is \$56,372.10. This is a claim for grouting, embodied in Section IV of the original petition, and embraced in the Court's findings in case No. K-366, Nos. III and VI, there indicated as consisting of 13,891 bags of cement pumped in grout into cavities in the timbered sections, not paid for, and 4,899.7 bags of cement used in grout poured into cavities in the rock section, the item of 4,899.7 bags being 9,032 bags consumed less a limit of 4,132.3 bags paid for. The Court did not include this item in its judgment of recovery.

The total number of bags of cement used in grouting, 22,923 bags, being the aggregate of 13,891 bags and 9,032 bags, converted by the liquid method described in the opinion of the Court, 76 C. Cls. 85, using 40 per cent of the dry-packed area as void, and one bag of cement to 2.62 cubic feet of grout, represents 5,561 cubic yards of space dry-packed and grouted. Of the excavation, dry-packing, and grouting involved in this cubic yardage, the defendant has had the use and benefit.

Unit prices named in the contract were for excavating \$17 per cubic yard, for dry-packing \$3 per cubic yard, and for grouting \$3 per bag.

All work was performed under the supervision of the contracting officer or his representative, and as directed by them.

3. The case comes to this Court under the special jurisdictional Act of February 27, 1942. The petition herein was filed July 7, 1942. The Act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

Approved, February 27, 1942.

Respectfully submitted,

EWART W. HOBBS,
Commissioner.